STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 98-573

CENTRAL MAINE POWER COMPANY
Request for Commission Resolution of
Railroad Crossing Dispute With Guilford
Transportation Industries

June 29, 1999

Order (Part II)

WELCH, Chairman; NUGENT, and DIAMOND Commissioners

I. SUMMARY

This proceeding involves a dispute between Central Maine Power Company (CMP) and Guilford Transportation Industries, Inc. (Guilford) concerning CMP's ability to construct fiber optic facilities across land owned by Guilford or its subsidiaries, Springfield Terminal Company, Maine Central Railroad, Portland Terminal Company and Boston and Maine Corporation. Specifically, CMP requested that Guilford approve, pursuant to a license agreement (Agreement) entered into between CMP and Guilford's subsidiaries, a fiber optic crossing over Guilford's premises in Scarborough,[1] and Guilford has refused on the grounds that the Agreement does not cover fiber optic crossings.

CMP filed a motion for summary judgment asking the Commission to determine that the Agreement allows CMP to obtain crossings for fiber optic communication lines over Guilford's premises. Guilford filed a cross motion for summary judgment asking the Commission to determine that the Agreement does not encompass fiber optic cable crossings and that the Agreement does not permit CMP to assign any of its rights under the Agreement to MaineCom Services (MaineCom) or Northeast Optic Network, Inc. (NEON).[2] We find that the Agreement unambiguously grants to CMP the right to cross Guilford's land with fiber optic cable or wire.[3]

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[1]CMP states that it has recently agreed to Guilford's terms for the Scarborough crossing due to time constraints, but that the applicability of the Agreement to fiber optic crossings in Scarborough and elsewhere is still in dispute.

[2]Because CMP Group, Inc. owns more than a 10% share of MaineCom, NEON and CMP, *(See* Affidavit of Ann Paré), MaineCom and NEON are affiliates of CMP within the meaning of 707(1)(A).

[3]Commissioner Diamond voted against this decision. See attached Dissenting opinion.

II. PROCEDURAL HISTORY

On July 24, 1998, CMP filed a request that the Commission adjudicate its dispute with Guilford over whether the terms of the Agreement govern CMP's request to cross Guilford's premises with a fiber optic line, pursuant to 35-A M.R.S.A. § 2311. The Examiner issued a Notice of Proceeding on August 8, 1998. The Notice requested that the parties indicate their positions on the necessity of a hearing. As a result of the parties' responses to the Notice of Proceeding, the Examiner scheduled a conference of counsel. At the request of the parties, the Examiner cancelled the scheduled conference so that the parties could try to reach a negotiated resolution to the dispute. The parties tried to settle the dispute over a period of several months. Eventually, however, the parties reported that they were unable to reach a negotiated resolution to the dispute. Accordingly, the Examiner and the parties developed a schedule for determining whether the Agreement provides for fiber optic crossings as claimed by CMP. The parties agreed that CMP would file a motion for summary judgment and the parties and the Examiner developed a briefing schedule in accordance with this proposal. CMP filed its motion and memorandum on March 5, 1999. Instead of filing an objection to CMP's summary judgment motion, Guilford filed its own motion for summary judgment on March 19, 1999. CMP filed a reply brief and also asked that the Examiner consider Guilford's motion as simply an objection to CMP's motion or in the alternative allow CMP the opportunity for additional briefing. Guilford replied that it has a right to file a cross motion for summary judgment and that the schedule, in any event, allowed it to file a surreply. CMP also objected to the Commission's consideration of certain assertions in Guilford's statement of material facts which CMP claims are immaterial to the Agreement at issue. Guilford filed a surreply to which CMP objected because it claims that it did not raise any new issues in its reply. Guilford responded that CMP did raise new matters and therefore a surreply was justified. An Examiner's report was issued on May 4, 1999 , to which both parties excepted. The Commission considered the Examiner's report and the parties' exceptions to that report at its May 17, 1999 deliberative session. The Commission issued a Part I Order describing the Commission’s decision on May 26, 1999.

III. RULINGS ON PROCEDURAL ISSUES

We will consider Guilford's cross motion for summary judgment even though the schedule did not contemplate Guilford's filing such a motion. CMP is not prejudiced by allowing Guilford's cross motion because Guilford had the opportunity for a surreply under the Examiner's procedural order. In addition, we reject CMP's claim that Guilford’s “surreply” was not justified. CMP's citation of cases relating to easements can be considered a "new matter" for the purpose of justifying a surreply. Finally, we believe the parties have fully and thoroughly briefed the issues necessary for deciding the motions. An additional brief by CMP simply is not necessary for the purpose of clarifying any matter raised in Guilford’s “surreply.”

We do, however, agree with CMP that we cannot consider paragraphs four and five of Guilford statement of material facts for the purpose of determining whether the contract is ambiguous. Because this material is outside the “four corners” of the

Agreement*,* we do not consider it in determining whether the Agreement is ambiguous*. See* Portland Valve, Inc. v. Rockwood Systems Corp., 460 A.2d 1383, 1387 (Me. 1983). *See also,* discussion of contract interpretation in Part VI below.

IV. STATUTORY FRAMEWORK

Section 2311 of Title 35-A grants the Commission jurisdiction over this dispute between Guilford and CMP. This section provides:

> A person maintaining or operating a telephone or electric line may construct a line upon or along any railroad with the written permit of the person operating the railroad. If the person seeking to construct the line cannot agree with the parties operating the railroad, as to constructing lines along the railroad or as to the manner in which lines may be constructed upon, along, or across the railroad, either party may apply to the commission, who after notice to those interested, shall hear and determine the matter and make their award, which is binding upon the parties. The person seeking to construct lines on the railroad shall pay the expenses of the hearing, except, that if the commission finds that parties operating the railroad have unreasonably refused their consent, those parties shall pay the expenses. Without limiting the Commission's jurisdiction under this section, if a railroad company and a telephone or electric utility enter into an agreement involving a utility crossing of railroad property and that agreement or some other agreement provides that the commission shall resolve disputes arising under the original agreement, the commission may resolve those disputes.

35-A M.R.S.A. § 2311. Thus, the Commission has jurisdiction over this matter because it is a dispute about the terms for constructing lines of a person (CMP) that maintains and owns both electric and telephone lines. In addition, the Agreement involves CMP's crossing of railroad property and, as discussed below, gives CMP the right to submit to the Commission a dispute over a requested crossing.

V. STANDARD FOR SUMMARY JUDGMENT

A summary judgment is appropriate if there is no genuine issue as to any material fact and if the moving party is entitled to a judgment as a matter of law. M.R.Civ.P. 56(c). The Law Court has stated:

> Summary judgment is inappropriate, where there exists a genuine issue of material fact that remains unresolved. In the case of ambiguity in a written contract, the intent of the contracting parties may constitute such a factual evidentiary basis precluding the application of summary process.

Baybutt Construction Corp. v. Commercial Union Insurance Company, 455 A.2d 914 (Me. 1983). Determining whether a contract is ambiguous is a question of law, *Portland Valve, Inc. v. Rockwood Systems Corp.*, 460 A. 2d 1383, 1387 (Me. 1983), as is the interpretation of an unambiguous contract. *Century Homes, Inc. v. Plaisted*, 412 A.2d 389, 391 (Me. 1980).

VI. DISCUSSION

A. The Agreement

The Agreement grants CMP a non-exclusive license to maintain certain appurtenances (existing as of the date of the Agreement, 1992) over, across, along or under Guilford's premises as well as certain approved additions in accordance with certain conditions set forth in the Agreement. The term "appurtenances" is defined as "pipes, poles, wires and other equipment." The Agreement further provides, in relevant part:

> The Licensee shall have the right to request that Additional Occupancies or Appurtenances ("Additions") be constructed or installed in, over, under, or across the Premises. The Licensee shall make each such request in writing and include with such writing full plans and specifications of the proposed Addition. With respect to railroad rights-of-way, Licensor shall grant the request, unless the Licensor's principal engineering officer reasonably determines that such Addition will interfere with Licensor's rail operations.

Agreement ¶ 2(a). The Agreement provides for payments for Additions in accordance with Schedule B attached to the Agreement. Schedule B provides a fee schedule based on voltage. For transverse crossings of appurtenances that carry 0-750 voltages the annual fee is $75, and for longitudinal crossings the annual fee is $0.35 per circuit foot for appurtenances that carry 0-35,000 voltages. The Agreement also provides:

> If Licensor denies the request as presented by Licensee or does not respond within said 45 day period, Licensee may submit the issue to the Maine Public Utilities Commission for resolution after giving Licensor at least 30 days notice of its intent to do so.

Agreement ¶ 2(d).

Paragraph 7 of the Agreement sets forth restrictions on CMP's use and occupancy of Guilford's premises. This section provides, in relevant part:

> (a) The Licensee shall only use the Premises to maintain the Occupancies and Appurtenances.
>
> . . . .
>
> (c) The Licensee acknowledges that the Licensor is under no obligation to restore, repair or maintain the Premises in any respect, including the removal of ice and snow therefrom. The Licensee agrees to not commit waste of the Premises.
>
> . . . .
>
> (e) The Licensee shall make no use of the Premises which would constitute a nuisance.

Paragraph 9 of the Agreement provides:

> For those Appurtenances which consist of electrical power or communication wires and equipment, Licensee shall promptly remedy any inductive interference with railroad operations growing out of, or resulting from, the presence of such Appurtenances.

B. The Parties' Positions

CMP argues that the terms of the Agreement unambiguously allow CMP to obtain fiber optic crossings over Guilford's premises. Specifically, CMP argues that the term “Appurtenances” includes fiber optic wires or cables. CMP finds support for its construction in the lack of any limitation of this definition to electrical wires and by Paragraph 9’s reference to "communications wires" as appurtenances. CMP argues that the parties’ intent, as determined from within the four corners of the agreement, was that the Agreement governs crossings of communications lines as well as electrical lines. Since fiber optic wire or cable is a communications line, the Agreement governs fiber optic crossings.

Guilford contends, on the other hand, that the Agreement covers only electrical crossings because Schedule A of the Agreement references only electrical installations. In addition, it contends that the term “communications wires” cannot be read to include fiber optic wires or cables because the term “wire” refers to strands of metal while fiber optics are made of glass. According to Guilford, the Agreement should have used the term “cable” if the parties intended the Agreement to include fiber optic cables. Guilford also points to Schedule B of the Agreement which contains a license fee schedule based on voltage amounts. Because fiber optic cables are not electrically charged, the parties could not have intended to include fiber optic lines. Guilford argues that the reference in Paragraph 9 to "communications wires" is meant to refer only to CMP's internal communications wires. Finally, Guilford disputes that MaineCom and NEON are affiliates within the meaning of the Agreement. For all of these reasons, Guilford maintains that the Commission should find that the Agreement does not govern CMP's request for a fiber optic crossing.

C. Analysis and Decision

To rule on CMP's motion for summary judgment and Guilford's cross motion we must construe the terms of the Agreement. We first determine whether the contract is, as both parties claim, unambiguous. We follow the ambiguity analysis set forth by the Law Court:

> The interpretation of an unambiguous writing must be determined from the plain meaning of the language used and from the four corners of the instrument without resort to extrinsic evidence. Once an ambiguity is found then extrinsic evidence may be admitted and considered to show the intention of the parties. Contract language is ambiguous when it is reasonably susceptible of different interpretations.

Portland Valve, Inc. v. Rockwood Systems Corp., 460 A.2d 1383, 1387 (Me. 1983) (citations omitted). However, “[a] contract need not negate every possible construction of its terms in order to be unambiguous.” *Waxler v. Waxler,* 458 A.2d 1219, 1224 (Me. 1983).

Applying this standard to the case before us, we conclude that we should grant CMP's motion if we determine that the only reasonable interpretation of the Agreement is that the rights granted to CMP include the right to install and maintain for fiber optic crossings over Guilford's premises and that these rights may be assigned or sublet to CMP’s affiliates. Conversely, we should grant Guilford's summary judgment motion if we conclude that the only reasonable interpretation of the Agreement is that it grants CMP only a right to electrical crossings, except perhaps for CMP's own communications lines. Further, if we are to grant either motion, we must do so based on the plain meaning of the language in the Agreement, and (in the absence of *undisputed* extrinsic evidence) we must look no further than the "four corners of the instrument." *Portland Valve,* 460 A.2d at 1387.

We first examine the definition of the term “Appurtenances”, which the agreement broadly defines as "pipes, poles, wires and other equipment." We agree with CMP that there is nothing in this language would lead us to conclude that the parties intended appurtenances to include pipes, poles, wires and other equipment only for the purpose of distributing and transmitting electricity. We further agree with CMP that the language in Paragraph 9 indicating that the term “Appurtenances” may include "communications wire and equipment" cuts against such a restrictive interpretation of the Agreement. Thus, we cannot determine, as a matter of law, that the parties intended to limit the license only to electrical crossings.

We next must determine whether, as CMP argues, the only reasonable interpretation of the Agreement is that the parties intended to authorize CMP to cross Guilford property with any lines, including fiber optic lines, over which information is communicated. Guilford contests this claim.

According to Guilford the plain meaning of the term "communications wire" is a metal wire. Fiber optics are made of glass.[4] Guilford asserts that the Agreement cannot be construed to include fiber optic crossings because there is no reference to the term "cable" in the definition of Appurtenances and because Paragraph 9 uses the term "communications wire and equipment." Had the parties meant to include fiber optics, according to Guilford, they would have used the term "communications wire or cable" or perhaps would have used the term "communications line." In support of its argument that the plain meaning of the term “wire” excludes any fiber communications line, Guilford supplies numerous dictionary definitions of the word "wire" as well as material from Internet sites. CMP has directed our attention to conflicting dictionary citations and Internet sites.

We conclude that the dictionary citations and Internet resources supplied by Guilford and CMP demonstrate that the term "communications wires" *may* include nonmetal conductors of messages. For example, one of the definitions of wire in the Random House Unabridged Dictionary is "(6) a long wire or cable used in cable, telegraph or telephone systems." *See also*, *Oxford American Dictionary* ("(2) a cable used to carry telephone or telegraph messages.") Moreover, the resources retrieved through CMP's Internet research demonstrate that the term wire is used in conjunction with the term "fiber optics." Finally, we note that the Law Court has used the term "fiber wire" in referring to fiber optics. *See AARP v. Public Utilities Comm'n*, 678 A.2d 1025, 1029 (Me. 1996).[5] Thus, the use of the term “wire” in paragraph nine does not indicate

[4]*See Central Maine Power Company, Request for Approval of Facility License Agreement with MaineCom Services*, Docket No. 96-421, Order (Part II) at 3 (Oct. 29, 1996) (”fiber optic cable contains strands of glass that are used as the medium for transmitting coded light pulses that represent data image or sound”).

[5]We also take note of the decision in *McDonald v. Mississippi Power Co.* 1999 WL 12839 (Miss. Jan. 14, 1999). In that case, the Mississippi Supreme Court interpreted the language in easements obtained in the 1950s. It upheld the lower court's conclusion that the easements which did not specifically reference fiber optic cable included fiber optics. Some easements obtained through eminent domain

that the parties intended to exclude fiber optics crossings from the rights generally granted to CMP under the Agreement. We conclude instead that the only reasonable interpretation of the Agreement is that it provides a broad grant to CMP of the right to cross Guilford property, and that the right to cross Guilford's land with fiber optic cable or wire is not excluded from this grant.

In addition to the provisions in the Agreement relating to appurtenances and communications wires, as discussed above, the Agreement also contains a specific paragraph entitled, "Licensee's Use and Occupancy of the Premises." Agreement ¶ 7. This paragraph provides in relevant part that CMP may use the premises only to maintain the Occupancies and Appurtenances and that it may make no use of the premises that would constitute a nuisance. If Guilford intended that CMP's use of the premises be further restricted it could have so indicated either in this paragraph or in a narrow definition of the term "Appurtenances."[6]

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proceedings contained the following general language:

> [F]or the erection and maintenance of poles, wires and other facilities and appurtenances necessary to, or used in connection with, an electrical transmission distribution line or lines . . . .

Id. ¶ 11. The lower court had determined that the omission in some deeds of the words "telephone and telegraph" in some of the easements "is immaterial, since appliance and equipment necessary and convenient therewith, or other similarly broad language is broad enough to encompass the fiber optic cable." *Id.* ¶ 4. The Mississippi Supreme Court affirmed the lower court's ruling that the broadly worded easements were broad enough to encompass "the use of communications lines. . . ." *Id.* ¶ 11. Thus, an additional basis for our finding that the agreement does not exclude fiber optic crossings is simply that fiber optic crossings can fit into the category of other equipment.

[6]We also reject Guilford's argument that Schedule A which lists existing crossings should define the scope of appurtenances. Guilford states that "[i]n providing for additional occupancies or appurtenances," the Agreement plainly means appurtenances serving the same purpose as those already in place." We disagree. There is no language limiting appurtenances to the same purpose as those listed in Schedule A. In addition, such a construction would make Paragraph 9 meaningless because no communications appurtenances would be permitted since their purpose is not to transmit electricity. We avoid any construction that would render a specific term meaningless. *See McCarthy v. U.S.1 Corp.,* 678 A.2d 48, 52 (Me. 1996), (citing, *Top of the Track Associates v. Lewiston Raceways, Inc.*, 654 A.2d 1293, 1296 (Me. 1995)). We further reject Guilford's claim that "Had the parties intended an agreement open to unknown new business interests of CMP, a meticulous author would have included an express definition of 'appurtenances,' rather than leaving its meaning to inference from a recital." Guilford's Memorandum at 7. This argument does not necessarily favor Guilford. One could argue just as easily that had Guilford sought to limit the types of appurtenances that could cross Guilford's premises, it would have been prudent to

We disagree with Guilford's assertion that Schedule B "demonstrates that the Master Agreement unambiguously excludes fiber optic cable." It is true, as Guilford points out, that license fees and other fees in Schedule B are related to the voltage carried by an appurtenance. Guilford argues that "this method of computing license fees and other costs is only applicable to electricity transmission lines, and it was plainly designed to apportion fees and costs roughly to the economic value of a crossing to CMP." Guilford Memorandum at 7. CMP counters that Schedule B provides fees for 0 voltage crossings; for transverse crossings the fee is $75 for crossings of appurtenances that carry 0-750 voltages. For longitudinal crossings the fee is $0.35 per circuit-foot for appurtenances that carry 0-35,000 voltages.[7]

CMP also asserts that in considering the parties' intent, we should consider whether installing fiber optic cable, rather than metal communications wire, would increase the burden on Guilford's property. Because Guilford has not produced any evidence that CMP's fiber optics have caused any greater burden on Guilford's property than CMP's metal wires or cables, we should conclude that the parties could reasonably have intended that the $75 minimum fee should apply to fiber optic crossings. Guilford counters that it is unreasonable to construe the Agreement to provide the same fee for a crossing with fiber optic cable which has immense message carrying capacity as "for a power distribution line to serve a single dwelling."

It is certainly possible that parties to an agreement such as this would consider the economic value of the grant, in addition to the burden on the land associated with the grant. Even if we concluded that the parties did so here, the broad language of the Agreement compels the conclusion that, when Guilford entered into the Agreement, it saw no reason to differentiate fiber crossings from metal crossings. If it had believed the difference important, it could have sought to specify a higher price for “fiber” communications wire.[8]

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include specific limitations in the contract.

[7]It appears that the requested Scarborough crossing and other requested crossings have been transverse rather than longitudinal crossings.

[8]We also reject Guilford's argument that paragraph 15 indicates the inapplicability of the Agreement to fiber optic crossings. Guilford argues that because CMP's affiliates will contract with other entities that will make use of the fiber optic lines, CMP would be, in effect, indirectly assigning a part of a crossing to a nonaffiliate. Because, according to Guilford, the Agreement requires Guilford's consent for such an assignment, the Agreement could not possibly encompass fiber optic crossings. Implicit in this argument is the assumption that Guilford will not give its permission for such a crossing. However, Paragraph 15 also states that Guilford's consent should not be "unreasonably withheld or delayed." Assuming, *arguendo,* that the affiliate's transactions with users of the cable constitutes an assignment of a part of the crossing, we cannot conclude that the Agreement is inapplicable to fiber optics simply on the basis of an action that Guilford may or may not take in the future and which may or may not be upheld if it is brought before us.

> We are further guided by the Law Court's admonition that:
>
> [C]ourts should not rewrite contracts, particularly agreements between two corporations acting at arms length. "We are skeptical, too, that so important a feature [as exclusive selling rights] of the franchise agreement would be so infelicitously phrased by those as astute as businessmen generally are." In the absence of any express language or of any ambiguous language, which would permit the admission of relevant extrinsic evidence, reasonably indicating such a restrictive intent, the court will not lightly import meaning into the contact."

Portland Valve, 450 A.2d at 1388 (quoting *Lee Flinkote Co., 593 F.2d 1275, 1282 (D.C. Cir. 1979)) (citations omitted).*

Because Guilford entered into a document which provides a broad grant to CMP to cross Guilford's property with " pipes, poles, wires and other equipment," including "communications wires," we find that the only reasonable interpretation of the contract is that the parties intended such a broad grant.[9] Although Guilford in hindsight may now conclude that a minimum fee of $75 per crossing for zero voltage appurtenances such as fiber optic cable or wire does not represent the economic value of the crossing to Guilford, we will not find ambiguity where there is none or rewrite the contract to find an exclusion where none exists.

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[9]We take note of the Law Court's decision that a divorce settlement agreement which did not expressly address the issue of the wife's interim monetary and other fringe benefits was not fatal to a finding that the agreement unambiguously did not provide for a setoff for such credits. *Waxler*, 458 A.2d at 1224. The court stated that "[a] contract need not negate every possible construction of its terms in order to be unambiguous." *Id.* Where this agreement is similarly broad, we will not find it is ambiguous simply because the agreement, including the price schedule, does not specifically mention fiber optics.

Finally, we address Guilford's claim that the term “affiliate” in the contract is ambiguous. We disagree. Section 15(a) of the Agreement provides:

> The Licensee shall not assign, sublet or sub-license (except to an affiliate of the Licensee) the whole or any part of the Premises at any time without the express written consent of the Licensor which shall not be unreasonably withheld or delayed. Any assignment by Licensee to its subsidiaries shall not require Licensor's consent. Any assignment, license, or lease of the Premises by Lessor shall be subject to Licensee's rights under this agreement.

MaineCom and NEON are affiliates within the meaning of 35-A M.R.S.A. § 707. *See* Affidavit of Ann Paré. Guilford does not contest this fact. Nor does Guilford state why the Commission should not rely on the Title 35-A definition of affiliates when its jurisdiction is invoked in this matter, both by Title 35-A and the terms of the Agreement. It is not enough for Guilford to simply contend that a term is "inherently ambiguous." Thus, we conclude that section 15(a) of the contract unambiguously allows CMP to transfer its rights to the contract to MaineCom and NEON without Guilford's permission.

We also reject Guilford’s argument that the term “affiliate” should be read to mean a “subsidiary” since the term “subsidiary” is used in the second sentence of Paragraph 15. Although the Agreement uses the term affiliate in the first sentence and subsidiary in the second sentence, we cannot read the word affiliate to be limited only to a subsidiary. First, the term is not so limited in Title 35-A. Second, Guilford has not placed before us any definition of affiliate that limits the term to include only subsidiaries.[10] For these reasons, we conclude that the parties intended that CMP could assign or sublet whatever rights it does have under the Agreement to any affiliate, as defined in section 707 of Title 35-A, not just a subsidiary.

[10]We note that in 1998, CMP reorganized into a holding company; CMP and other existing affiliates became subsidiaries of CMP Group, Inc. and affiliates of each other. However, at the time the Agreement was drafted, CMP's then-existing affiliates were also its subsidiaries. Therefore, there was no incongruence in using the words interchangeably

VII. CONCLUSION

For the reasons stated above, we grant CMP's motion for summary judgment.

Dated at Augusta, Maine this 29th day of June 1999.

BY ORDER OF THE COMMISSION

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Raymond J. Robichaud
Assistant Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent

COMMISSIONERS VOTING AGAINST: Diamond: See attached Dissenting Opinion

Dissenting Opinion of Commissioner Diamond

I dissent from the Commission's order. I believe the contract is ambiguous with respect to its applicability to fiber optic cable, and thus, I would deny the summary judgment motions of both Central Maine Power Company (CMP) and Guilford Transportation Industries, Inc. (Guilford).

The intended scope of the contract is unclear from the outset. The preamble paragraphs, designed to provide the context against which the document is to be interpreted, offer the unhelpful observation that the parties desire "to consolidate the several agreements with a single agreement." Indeed, the preamble virtually invites reference to extrinsic evidence - namely, the previous agreements - to ascertain the underlying purposes of the contract. More specifically, the language gives no indication whether the license to locate equipment on Guilford property was tied to CMP's activity as an electric utility, was designed to enable CMP to engage in the telecommunications business, or could extend to any purpose which CMP might imagine. Thus, to the extent we are to construe contracts with "respect to … the motive and purpose of making the agreement, and the object to be accomplished," *Baybutt Construction Corp. v. Commercial Union Insurance Company*, 455 A.2d 914, 919 (Me. 1983), we are operating in the dark if we are limited to the four corners of the document.

With no real statement in the agreement of its intended scope, it is not surprising that each party grasps a single word in the 17-page document as support for its position and holds on for dear life. Interestingly, the chosen words appear in the same phrase, "communication wires." For CMP, the first word unambiguously demonstrates that the contract covers fiber optic cable; for Guilford, the second just as unambiguously proves the opposite proposition. I find each party's arguments sufficient to defeat its opponent's claim but insufficient to establish its own.

The crux of CMP's position is that the use of the word "communication" in paragraph 9 makes it clear that the agreement applies to fiber optic cable. Guilford puts forth four arguments that call this conclusion into question.

First, Guilford offers a stack of dictionary and encyclopedia references to the effect that "wire" refers to a metal conduit, which would not include a fiber optic cable. It also points to the absence of the word "wire" in various sources dealing with fiber optics.[11]

In fairness, CMP invokes some references suggesting that the terms "fiber optic" and "wire" can be used together. The ability of the parties to uncover conflicting

[11]Assuming that members of this Commission, as regulators of the telephone industry, can draw upon personal knowledge (which is presumably one of the reasons the Legislature gave the Commission jurisdiction over these agreements), the phrase "fiber optic wire" does not for me have a familiar ring. I do not view that as dispositive of this matter but as simply another reason why I feel a need to go beyond the language of the contract.

authorities demonstrates that the matter is less than clear. Put somewhat differently, neither CMP nor Guilford wins the dictionary game; rather, the winner is the proposition that the contract is ambiguous.[12]

Second, the one provision in the agreement in which the phrase "communication wires" appears could not apply to fiber optic cable. Paragraph 9 addresses the problem of inductive interference, and as Guilford points out and CMP does not refute, such interference cannot occur with fiber optic cable. When read in the context of paragraph 9, there is certainly a question as to whether "communication wires" was intended to encompass fiber optic cable.

Third, Schedule B to the contract sets the license fee for longitudinal crossings on the basis of the number of circuit-feet of the conduit and then proceeds to state that "[a] circuit-foot is one linear foot for either a single or multi-phase *electric line*." (Emphasis added.) This language evidences an intent that the contract apply only to electric lines. In what I take to be its answer to this point, CMP alludes to the specific nature of the phrase "communication wires" and argues that the specific trumps the general, but it is unclear why "communications wires" is more specific than "electric lines." Again, I see this as a standoff for the parties and a triumph for ambiguity.

Fourth, Schedule B provides the license fee for traverse crossings based on voltages, which has no applicability to fiber optic cable. CMP is correct that the lowest fee level, for voltages between 0 and 750, would technically include fiber optic cable, but that would mean that the fee for these very valuable, high capacity communication lines would be extremely low. While it is not inconceivable that the parties intended this result, it is one more source of uncertainty, adding to the conclusion that the contract is ambiguous.

CMP's position might be said to derive support from the language in the second paragraph of the preamble, which essentially defines "Appurtenances" as including "pipes, poles, wires and other equipment." The problem is that this argument proves too much, as it would allow CMP to put any type of equipment for any purpose on Guilford's property. While CMP attempts to dismiss what it characterizes as Guilford's "parade of horribles" by pointing out that it is only seeking an interpretation that the contract includes fiber optic cable, it does not really provide an answer to the problem with relying on the definition of "Appurtenances" and indeed appears to implicitly agree that there must be limits on the types of items to which the contract applies.

[12]The scope of "wire" seems very much driven by the context in which it is used. For example, *Newton's Telecom Dictionary* defines "wireline" as "[a]nother name for a telephone company that uses cables, not radio." By contrast, the same dictionary defines "wire stripper" as "[a] tool which takes the insulation off a wire without hurting the inside metal conductor." It is because the context tends to determine how broadly the words that are at the heart of this dispute should be read that I believe extrinsic evidence is needed to determine what the parties were seeking to accomplish.

As I hope the preceding discussion demonstrates, I am no more impressed with Guilford's contention that the contract unambiguously does not include fiber optic cable. I believe that the arguments advanced by CMP, while insufficient to establish its entitlement to summary judgment, do suffice to defeat Guilford's claim. I have dwelled on the inadequacy of CMP's position solely because of its acceptance by my colleagues.

All have agreed that our obligation in construing contracts "… is to give effect to the intention of the parties…." *Baybutt Construction Corp. v. Commercial Union Insurance Company, supra* at 919. That obligation seems especially great where, as here, the law requires a party to enter into an agreement, *see* 35-A M.R.S.A. § 2311, that it might not otherwise see as being in its best interests.

When the agreement is read against the backdrop of developments in the world of telecommunications and 35-A M.R.S.A. §2311, it seems clear that this dispute is really about whether the contract was designed to give CMP access to Guilford property simply to allow CMP to conduct its traditional operation as an electric utility or also to engage, on a potentially significant scale, in telecommunications activities.[13] I view that as too important a question to be answered by counting the number of dictionary definitions of "wire" that include the word "metal." Whether extrinsic evidence will yield a clearer picture of the general intent of the contract and its specific applicability to fiber optic cable cannot be known at this juncture, but our obligation "to give effect to the intention of the parties" requires that we go beyond the ambiguous language of the agreement.

[13]With advances in telecommunications, a business opportunity has developed for those with extensive rights-of-way to provide long-distance fiber optic cable capability. There has not been a similar demand for copper wire.

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320 (1)-(4) and the Maine Rules of Civil Procedure, Rule 73 et seq.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320 (5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.